IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 51 OF 2018

BETWEEN

TOSHIKE CONSTRUCTION COMPANY LIMITED.....APPELLANT

AND

HARAMBEE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi (F. Tuiyot, J.) dated 12th October, 2017

in

Civil Case No. 121 of 2011)

****

JUDGMENT OF THE COURT

This appeal challenges the exercise of judicial discretion by **Tuiyot, J.** who, on 12th October, 2017 set aside the judgment of **Mabeya, J.** made on 19th December, 2012 in default of the respondent entering appearance or filing defence. It also challenges the finding that the respondent was entitled to the order for setting aside *ex debito justitiae.*

The main dispute relates to enforcement of an agreement made between the appellant and the respondent on 17th March, 2006 for sale of a LR. No. 209/746 situate in Nairobi, which was owned by the respondent. The appellant contended that it had complied with its part of the bargain and even taken possession of the property pending completion of the transaction, but the respondent had, in breach of the agreement, failed, refused or neglected to deliver the completion documents. The appellant filed suit on 4th April, 2011 seeking an order for specific performance and general damages for breach of contract.

Summons to enter appearance was issued and, according to the appellant, duly served on the respondent, but no appearance or defence was filed. Interlocutory Judgment was entered and subsequently, a formal proof was conducted before Mabeya, J. who, in his Judgment aforesaid, granted the prayer for specific performance of the contract but declined to grant the prayer for general damages.

The respondent says it became aware of the *ex parte* judgment during the process of execution in July 2013, and at first, it was prepared to accept the judgment. It then tried to engage the appellant in efforts to have the matter settled amicably but the negotiations fell through, hence the decision to file the notice of motion dated 5th October, 2016 seeking an order for setting aside the *ex parte* judgment. The motion fell before Tuiyot, J. for hearing and in his ruling aforesaid, the learned Judge allowed the application, stating that the respondent was entitled to the order as of right. In doing so, he rejected the contention by the appellant that the application was incompetent as it was not supported by a valid affidavit; that the summons to enter appearance had been properly served on the respondent; that there was unreasonable delay of 39 months in filing the application; and that there was no legal or factual basis for setting aside the judgment of Mabeya, J.

In its challenge to the ruling, the appellant listed 11 grounds in the memorandum of appeal which were summarized into four issues in written submissions as follows:-

> ***"a) Whether the Learned Judge erred in fact and in law in failing to strike out the undated Supporting Affidavit allegedly sworn by Gladys Gichohi.***

b) Whether the Learned Judge erred in fact and in law in finding and holding that the Respondent herein was not served and/or was not properly served with the Summons to Enter Appearance.

c) Whether the Learned Judge erred or misdirected himself when exercising his judicial discretion in favour of the Respondent.

d) Whether the Learned Judge erred in fact and in law in allowing the Notice of Motion application dated 5th October 2016".

Learned counsel for the appellant, **Mr. Alfred Ndambiri,** orally highlighted the written submissions and, on the first issue, urged that the motion before Tuiyot, J. was hollow as it had no evidential backing. That is because the affidavit in support thereof was defective, lacking as it did in its jurat: the name of the person who signed it, the date it was sworn, and the true signature of the deponent. Counsel referred to ***section 5*** of the **Oaths and Statutory Declarations Act** for those requirements. He also referred to the Uganda Court of Appeal case of ***Saggu Roadmaster Cycles (U) Ltd [2002] 1 E A 258*** where it was stated that it was mandatory to have an affidavit dated; and the High Court case of ***West Kenya Sugar Company Limited vs P. J. Shah & 2 Others (UR)*** where a defective jurat led to the striking out of an affidavit.

In response to that issue, learned counsel for the respondent, **Mr. Gibron Darr,** castigated the raising of procedural irregularities by counsel in the face of ***sections 1A*** and ***1B*** of the **Civil Procedure Act (CPA)** and ***Article 159 (2) (d)*** of the **Constitution,** all of which decry technicalities of procedure in favour of substantial justice. He submitted on the merits that the trial Judge had the impugned affidavit before him and was not able to discern the defects alleged by the appellant. It bore the date it was sworn, the place at which it was sworn, and there was no proof that the signature appended on the affidavit was different from the usual signature of the deponent. Counsel wondered why the appellant did not apply for cross examination of the Commissioner of Oaths who administered the oath, if the objection taken was a serious one. He relied on the Ugandan authority cited by the appellant, the ***Saggu case (supra)*** referred to in the High Court case of ***Gayatri Industries Ltd vs Harambee Sacco Ltd [2004] eKLR,*** which declared that an affidavit cannot be vitiated by an irregularity in form in view of the Ugandan Constitution which is *in pari materia* with ***Article 159 (2) (d)*** of the Kenya Constitution.

Turning to the second issue relating to service of summons to enter appearance, Mr. Ndambiri observed that the respondent had denied ever having been served with the summons and had termed the purported service as *'a sham, fraudulent and/or improper*' since the process server did not identify the person served. Counsel pointed out that the respondent had dishonestly omitted to display the affidavit of service which showed that its General Manager **(GM)** was duly served and acknowledged the service by stamping the process server's original copy. It was instead the appellant who produced the full document on record. He referred to ***Order 5 rule 3 (a)*** of the ***Civil Procedure Rules (CPR)*** which authorizes service of summons on a *"secretary, director or other principal officer of the corporation"*, and the Supreme Court decision in ***Koinange Investments & Development Ltd vs Robert Nelson Ngethe [2014] eKLR*** which affirmed that ***rule 3*** governed the service of summons on corporations.

Counsel further cited ***rule 15*** which requires of a serving officer to file an affidavit of service stating *"the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing delivery or tender of summons"*. He also referred to the affidavit of service on record upon which the process server was cross examined, without denting his credibility, and submitted that it was fully compliant with the rule. The case of ***Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another [2014]*** where this Court held that *"service of summons on an authorized officer or legal officer attached to the corporation is deemed as service on the institution.."* was relied on.

Finally on this issue, counsel wondered why the respondent never summoned the GM to testify on the service or obtain an affidavit sworn by him denying service instead of relying on hearsay evidence. For all those reasons, counsel concluded, there was no basis for the finding that there was no service or that an order should issue *ex debito justitiae.*

In response, Mr. Darr referred to the affidavit of service filed by the process server pursuant to ***rule 15*** and submitted that it omitted the manner in which the GM was identified, the full name and gender of the person served, and the identities of the persons who identified the GM to the process server. With those missing particulars, he submitted, the trial Judge was justified in finding that the service was not proper and it was not for this Court, which did not see or hear the process server testify, to fault the learned Judge on assessment of the evidence. The case of ***John Mutora Njuguna t/a Topkins Maternity & Clinic vs Z W G [2017] eKLR*** was relied on for the standards of review applicable on first appeal.

On the penultimate issue as to whether there was a misdirection in the exercise of judicial discretion, on the assumption that the entry of *ex parte* judgment was regular, Mr. Ndambiri listed the principles governing the exercise of judicial discretion which were succinctly summarized in the cases of ***Pithon Waweru Maina vs Thuka Mugiria (1982-88) I KAR 171***; ***Patel vs EA Cargo Handling Services Ltd [1974] EA 75***; and ***Mbogo vs Shah [1968] EA 93***. Counsel referred to the record which established that the respondent had been served with the summons on 3rd August, 2011; it engaged the appellant in negotiations, which fell through, soon after service of summons to enter appearance; the decree obtained after formal proof was served on the respondent together with a penal notice on 24th April, 2013; a certificate of costs was issued on 7th July, 2013 and was settled by the respondent which made no claim that the judgment was irregular; an application to punish the respondent for contempt of the decree was filed on 19th September, 2013 which application the respondent replied to on 21st March, 2014; the contempt application was withdrawn and another application for enforcement of the judgment filed on 11th April, 2016 and again the respondent replied to it admitting that it was aware of the suit and had not refused to comply with the judgment.

From all those facts, asserted counsel, it was clear that the respondent was aware of the suit in August 2011 and not in July 2017 when it was served with the certificate of costs as erroneously claimed by the respondent and accepted by the trial Judge. For a period of 39 months, the respondent made no application to have the judgment set aside and there was no evidence that the delay was due to any hardship, accident, inadvertence or mistake. According to counsel, the filing of the application to set aside the judgment was a mere evasion, obstruction or delay of justice and the trial Judge was in error in failing to consider all the relevant factors and in doing so arriving at the wrong decision. The cases of ***Kenya Orient Insurance Limited vs Cargo Stars Limited & 2 Others [2017] eKLR*** and ***James Kanyita Nderitu & Another vs Marios Philotas Ghika & Another [2016] eKLR*** were cited in aid of those arguments.

In response to that issue, Mr. Darr submitted that the case was not decided on the basis of exercise of discretion but on the finding that there was no service of summons to enter appearance and therefore that the order would issue as of right. He cited the case of ***James Kanyita Nderitu (supra).*** Nevertheless, he contended, even if the matter required the exercise of discretion, the principles set in the ***Pithon Waweru Maina case (supra)*** were satisfied. That is because the trial Judge considered the period of delay and was satisfied that it was explained by negotiations towards an out of court settlement which failed. There was also a draft defence on record which the appellant did not contest as frivolous, and which raised triable issues. The unfettered discretion of the trial judge should therefore remain undisturbed.

Finally, Mr. Ndambiri submitted that the respondent's application as drawn sought the setting aside of a non-existent *ex parte* judgment purportedly made on 28th March, 2011 and the trial Judge made orders in respect of such application. According to counsel, the request for interlocutory judgment was made on 9th September, 2011; the judgment entered on 19th December, 2012 after formal proof; and the decree issued on 28th March, 2013. In his submission, the trial court ought to have dismissed the application as it related to a non-existent order as was done by the High Court **(O. K. Mutungi, J.)** in the case of ***Waki Clearing & Fowarding Agents Ltd vs Rom Communication Systems Ltd [2005] eKLR.***

In response, Mr. Darr contended that the issue was an afterthought as it was not raised before Tuiyot, J. for his decision. He observed that Tuiyot, J. issued an order for setting aside the *ex parte* judgment entered in the suit and gave leave for filing a defence. There was only one *ex parte* judgment entered in the matter and therefore no confusion could arise. He distinguished the ***Waki Clearing & Forwarding case (supra)***, which was decided before the new Constitution, on the basis that the prayer made in that case merely mentioned the date without specifying the nature of the order sought. In this case, the nature of the application before Tuiyot, J. was spelt out and there has since been compliance with the filing of the defence by the respondent and a reply to the defence by the appellant, in readiness for the trial. There was no ambiguity.

We have considered the matter fully. In our view, two of the four issues urged by the parties can be quickly disposed of. The first is the issue of a defective affidavit having supported the application for setting aside the *ex parte* judgment. In rejecting that issue, Tuiyot, J. reasoned as follows:

> ***"4. What is to be said about the jurat to the Affidavit? In the Supplementary Affidavit of FELISTERS BOCHABERI ONKWARE sworn in response to the Application she states as follows:-***
>
> ***7. THAT further, I hereby state that I have given instructions to my Advocate to on or before the hearing of the Notice of Motion application dated 5th October 2016 apply that the Supporting Affidavit of Gladys Gichohi filed in Court on 10th October 2016 be struck out for being incompetent as the same does not show or indicate who signed the said affidavit also when the said affidavit was signed. Annexed herein and marked FBO-o(a) is a copy of the affidavit.***
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> ***8. THAT further, I have also instructed my Advocate to apply for summons requiring the Commissioner for Oaths who witnessed the signing of the said Supporting Affidavit to attend Court and be cross-examined on the signature and presence of the person who signed the said Supporting Affidavit. (my emphasis).***
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> ***5. From paragraph 7 of that Affidavit, the Respondent raised two issues. That the name of the signatory to the Affidavit and the date of attestation are missing from the jurat. To be fair to the Applicant the date of attestation is indicated, at least on the Court copy of the Affidavit. It is 10th October, 2016. True, however is that the name of the signatory is not indicated. However, the name of a signatory to an Affidavit is not one of those particulars that the Oaths and Statutory Declarations Act requires must appear on the jurat or attestation Clause. In this respect section 5 of The Act provides as follows:-***
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> > ***"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made".***
>
> ***It nevertheless seems logical that the name of the person signing the affidavit is a critical aspect of the Jurat because it would confirm that the deponent is indeed the person who signed it (see Rule 7 of the Oaths and Statutory Declarations Rules). It must be stated, however, that the absence of the name of the signatory need not be given undue significance unless it can be shown that the person who signed the jurat is unlikely to be the person who is said to have made the oath at the beginning of the Affidavit and deponed to its contents.***
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> ***6. In the matter at hand the Respondent had stated that it would be asking the Commissioner of Oaths (who witnessed the signing) to attend Court for cross-examination on the signature and presence of the person who signed the Supporting Affidavit. This intention was not followed through and it must be taken that the Respondent did not consider it much of an issue after all.***
>
> ***7. This Court has no reason to fault the manner in which the Affidavit of Gladys Gichohi was executed and attested".***

We have examined the impugned document ourselves and find no reason to differ from the factual findings made thereon. In any case, the ***Saggu case (supra)*** which was relied on by the appellant does not support the proposition that any defect in the supporting affidavit is fatal. The case instead declared that an affidavit cannot be vitiated by an irregularity in form in view of the Ugandan Constitution, which is *in pari materia* with ***Article 159 (2) (d)*** of the Kenya Constitution. The Ugandan Court of Appeal held as follows:

> ***"the defect in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (8), of the 1995 Constitution, which stipulates that substantive justice shall be administered without undue regard to technicalities. I should perhaps mention that the jurat is the short statement at the foot of the affidavit indicating when, where and before whom it was sworn. It would follow that the learned judge had the power to order that the undated affidavit be dated in court or that the affidavit be re-sworn before putting it on record. He was also correct to penalize the offending party in costs".***

The Court further held:

> ***"..the statutory provision which renders it mandatory to date the affidavit before tendering it in court simply means that an affidavit cannot be used without dating it or indicating where it was sworn and before whom. The errors and omissions regarding the date, place and the commissioner cannot vitiate an application".***

We think for ourselves that the approach adopted by the Ugandan Court is persuasive and applicable in this case. We reject the first issue.

The next short issue is the contention that the application related to a non-existent *ex parte* order purportedly made on 28th March, 2011 and ought, therefore, to have been dismissed *in limine*. As correctly pointed out by the respondent, the issue was an afterthought as it was never raised before Tuiyot, J. for his decision. It was a matter of mixed fact and law and it ought to have been raised before the trial court for a finding to be made. The reason for not raising it, however, appears to be obvious: none of the parties had any doubt about the *ex parte* judgment sought to be set aside. There was only one judgment entered by Mabeya, J. in favour of the appellant after formal proof. And that is the judgment dated 19th December, 2012 which led to the issuance of a decree on 28th March, 2013. Indeed, the record of proceedings does not show the date on which the interlocutory judgment was entered although one is recorded. We are told by the appellant that the request was filed on 9th September, 2011. But the record of proceedings starts with the date "19th October, 2011" when an *ex parte* mention date was taken by the appellant's counsel. We are not persuaded by the High Court authority relied on by the appellant, the ***Waki Clearing & Fowarding Agents Ltd case (supra)***, which was decided before the new Constitution, and which, in any event, is distinguishable. The issue has no merit and is rejected.

The gravamen of the appeal is the finding that the summons to enter appearance was never served on the respondent, who was thus entitled to an order *ex debito justitiae.* Tuiyot, J. took issue with the following paragraphs of the process server's affidavit of service:

> ***2. "THAT on the same day with the directions from one of the Plaintiff's Company Director, I proceeded to the offices of Messers Harambee Cooperative Savings & Credit Society Limited, situated at Harambe Co-op Plaza, 4th Floor, along Haile Sellasie Avenue, herein Nairobi. Whereupon introducing myself and the purpose of my visit, at about 10.00am, I personally managed to effect service of the said Summons to Enter Appearance and copy of the Plaint by tendering and or delivering copies of the same to the General Manager who willingly accepted service on behalf of the Defendant and acknowledged receipt by signing and stamp printing on the reverse of the Principal copy returned herewith duly served.***
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> ***3. THAT the said General Manager admitted to be having express authority to accept and or receive all legal documents on behalf of the Defendant Company herein and to be well conversant with the matter in question herein due to the various correspondences exchanged between the parties herein".***

The learned Judge found and held thus:

> ***"11. Clearly, the Affidavit of Service falls short of the requirements of Order 5 Rule 15 which provides:-***
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> ***15. (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person if any identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.***
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> ***(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both". (my emphasis)***
>
> ***12. In his evidence to Court the Process Server says that three individuals manning the Respondent's offices directed him to the office of the General Manager. This important piece of information is left out of the Affidavit of Service. So the Affidavit of Service does not state how the Process Server indentified the person he purportedly served. Clearly therefore, that service was not proper.***
>
> ***Nevertheless, the Respondent still asks me to consider the following and to refuse to grant the prayers.***
>
> ***13. That the Applicant was truly served and it is for that reason that it left out from the affidavit of Gladys Gichohi, the reverse side of the Summons which had its official receipt. That this would amount to material non-disclosure and a deliberate mislead.***
>
> ***14. It is true that in support of the contents of paragraph 7 of her affidavit, Gladys Gichohi annexes a copy of the Affidavit of Service. It is also true that she does not annex the reverse side of the Summons said to have been duly received. Yet the truth of the matter is that she left out the entire summons i.e. both the front and reverse side. In the circumstances can it be said that she was deliberately suppressing the fact that there was an allegation by the Plaintiff and the Process Server that the Defendant had not only received the Summons but also acknowledged its receipt by stamping on the reverse thereof? Perhaps not because in her affidavit she reproduces paragraph 2 of the Affidavit of Service which contains that allegation and in addition annexes a copy of the Affidavit of service in its entirety.***
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> ***15. Secondly no negative inference can be made from the Defendant's letter of 11th July 2013 to their Lawyers Oraro & Co. In that letter the Defendant states that it had been served with a Certificate of Costs but could not find any Pleadings previously served on it. This is consistent with its position that it became aware of these proceedings on 8th July 2017 when they were served with a Certificate of costs. Responding to this letter the said Advocate wrote back on 24th July 2013 in which they state that after***

perusing the Court file they learnt that,

"...2 summons were served upon yourselves on 3rd August 2011 by one Mr. Ismael Mwaura and were duly acknowledged".

16. This is as plain as can be. The Lawyers were informing the Defendants what was on the Court record. This cannot be interpreted to mean that the Defendant was indeed served or would have been aware of the suit prior to the time of service of the Certificate of Costs as is alleged".

With respect, those findings are unsupportable. Firstly, the process server testified orally and was cross examined on his affidavit of service. He was not moved in his assertion that he personally served the respondent's GM with the summons to enter appearance and he was present when the GM affixed the respondent's stamp and counter signed it. He did not need anyone to identify the GM and did not need to list the names of the people he met on his way to the GM's office. He gave the name of the GM as 'Wandera' and no one turned up to deny that the said Wandera existed and was indeed the respondent's GM. He also confirmed that he had previously served the GM with court process.

Secondly, why was it that the respondent was reluctant to reveal the stamp affixed and countersigned by the GM? The respondent did not explain the omission; the appellant contended it was a deliberate attempt at concealment of a fact; and the trial court took no issue with the entire issue since, in his finding, the entire document was left out, not simply the reverse side. Whatever the case, the true document that was placed on record by the appellant, without contest, confirmed that the GM had acknowledged receipt of the summons to enter appearance.

Thirdly, according to the proceedings, the matter was mentioned severally after entry of interlocutory judgment in October 2011, and before the date of formal proof in March 2012, for the purpose of discussions and settlement out of court. When the appellant sought to execute the decree, the respondent, in its affidavit dated 27th July 2016, swore, in part, as follows:

"19. THAT for the avoidance of doubt, the Society has not refused to comply with the judgment of the Honourable Court. To the contrary, compliance with the said judgment has been frustrated by legal processes beyond the society's control and which are overseen by statutory bodies not party to this suit and beyond the society's authority".

The respondent, in its application filed on 10th October, 2016 asserted that it became aware of the suit on **8th December, 2013**. For some reason, the trial court found that the respondent became aware of the proceedings on **8th July, 2017**. It is clear to us that the claim made by the respondent, and the finding made by the trial court, as to when the respondent became aware of the proceedings are not supported by the evidence on record. Ordinarily, this Court is not at liberty to interfere lightly with findings of fact made by the trial court. But it will do so where the findings are '*based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding'. See* ***Mwangi vs Wambugu [1984] KLR 453.*** Such is the case here.

There is considerable force in the appellant's argument, supported by uncontroverted evidence, that the respondent was duly served with the summons to enter appearance. For reasons other than such service, the respondent did not defend the suit, hence the entry of the *ex parte* judgment against it. In our finding, the judgment was regular and the respondent was not entitled to an order setting it aside *ex debito justitiae*. We uphold that ground of appeal.

But that is not the end of the matter. A trial court always reserves the right to set aside any *ex parte* judgment. The general power is donated under ***Order 10 Rule 11*** of the **Civil Procedure Rules** which provides:

"Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

We may sample the principles applicable under the rule from this Court's decision in the ***Pithon Waweru Maina case (supra),*** thus:

"(a)Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Patel vs EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs Mbogo [1967] EA 116 at 123B, Shabir Din vs Ram Parkash Anand (1955) 22 EACA

48. (c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo vs Shah [1968] EA 93."

In the case of ***Kimani vs McConmell [1966] EA 545*** this Court emphasized that *'all facts and circumstances both prior and subsequent and of the respective merits of the parties'* ought to be considered.

Did the trial court exercise its discretion in line with the above principles? That is the final issue.

Tuiyot, J. did consider and reject the issue of delay which was raised by the appellant, for reasons given in the ruling. We find no reason to disturb the exercise of that discretion. However, due to the preoccupation with the issue of service of summons to enter appearance, the learned Judge said nothing about other relevant factors that ought to have been examined in the judicious exercise of discretion.

The most glaring omission was the draft *'defence and counterclaim'* placed on record by the respondent through the motion filed on 10th October, 2016. As was stated in the case of ***Sebei District Administration vs Gasyali (1968) EA 300***:

> ***"The nature of the action should be considered, the defence that has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."***

The defence need only raise a *bona fide* triable issue, which *is 'any matter that would require further interrogation by the court during a full trial'*. ***The Black's Law Dictionary*** defines the term *'triable'* as, *'subject or liable to judicial examination and trial*'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. See the ***Patel case (supra)*** and ***Olympic Escort International Co. Ltd. & 2 Others vs Parminder Singh Sandhu & Another [2009] eKLR***.

It was also held in ***Tree Shade Motors Ltd vs DT Dobie & Anor [1995-1998] 1EA 324*** that:-

> ***'Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.'***

We have examined the *'draft defence and counter claim'* and find that they raise issues that go to the root of the subject matter in dispute and they cannot be said to be frivolous. They raise triable issues. Indeed, we are told that the defence and counter claim has already been filed and served, and the response thereto has been made by the appellant. In those circumstances, it is our view that the parties should have a fair chance of agitating the respective merits of their cases. We think the learned Judge made an error in principle when he failed to consider the 'draft defence and counterclaim' and we must interfere with the orders made in the matter.

Having said that, it is not lost to us that the respondent had, for a long time, given the impression that the matter would be negotiated and settled but failed to place any defence on record pending that settlement. Prudence required such precaution or an undertaking from the appellant that the omission to file a defence would not be held against the respondent pending the negotiations. Such conduct was prejudicial to the appellant, not to mention the considerable costs unduly incurred. We shall advert to this in our final orders.

In the result, we allow the appeal to the extent that the order setting aside the default judgment of Mabeya, J. made on 19th December 2012 or any other *ex parte* judgment, as a matter of right, shall be and is hereby set aside. We substitute therefor the following orders:

> ***i. The ex parte Judgment dated 19th December, 2012 as well as the consequential decree issued pursuant thereto on 28th March, 2013, be and are hereby set aside in exercise of the Court's discretion.***
>
> ***ii. Leave be and is hereby granted to the respondent to defend the suit on condition that the respondent pays all costs thrown away, which shall be taxed, if not agreed.***
>
> ***iii. In default of payment of the thrown away costs as taxed or agreed, execution for the costs shall issue without further application for a court order.***
>
> ***iv. The statement of 'defence and counter claim', as well as the reply to the 'defence' and 'defence to the counter claim' filed pursuant to the order of the High Court dated 12th October, 2017 be and are hereby deemed to have been properly on record.***
>
> ***v. The status quo obtaining as at 12th October, 2017 with respect to the disputed property shall remain in force until the hearing and determination of the suit before the High Court.***
>
> ***vi. The respondent shall bear the costs of the appeal.***

Orders accordingly.

Dated and delivered at Nairobi this 21st day of June, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR